State of New Hampshire
OFFICE OF ATTORNEY-GENERAL

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March 27

James J. Barry, Commissioner,
Department of Public Welfare,
State House Annex

Dear Sir:

During a recent conference with Miss Borton of your staff, my opinion concerning the position of the Department of Public Welfare in respect to the support of children whose custody was granted to it under the provisions of R.L., c. 132, was requested. I submit my views below, and, in addition, take this opportunity of discussing various phases of c. 132 which I believe would be of interest to you.

It may be well, first, to consider the nature and purpose of the statute under consideration. It is, in fact, the statutory embodiment of the long established rule that the state has a duty to protect its citizens of tender age. Our Supreme Court has said of R.L., c. 132, that

> "it is designed to permit the exercise of the powers of the state as parens patriae for the purpose of rehabilitating minor children . . .". Petition of Norin, 95 N.H. 518.

With this in mind, we may examine the specific terms of the law as they treat of neglected children.

Action under the statute commences with the filing of a petition in a municipal court in the county wherein the child resides or is found. (s. 3). Such petition may be filed by any reputable person having information of the circumstances. Your attention is invited to the requirement that the facts constituting neglect must be set forth and an affidavit as to their verity made. Thus, the petition should contain an allegation that a certain named child, found or residing in a certain named place within the county, is a neglected child. There should follow a factual statement setting forth in detail the facts constituting neglect. These are the same facts which will later be presented at the hearing on the matter. Oath should be taken to the effect that such facts are, to the best of the knowledge and belief of the petitioner, true.

Section 4 of the statute requires that notice issue forthwith upon the filing of the petition; such notice should be under the hand of

the Judge or clerk of the court, directing the person having charge of the child to appear before the court at a stated time less than twenty-four hours after service of the notice. Such service should be made by a deputy sheriff or a sheriff; service in any other manner in all probability does not legally bind the person summoned to appear, and would be a bar to bringing against him the contempt proceedings authorized in section 5. The sheriff will note the fact that he has made service on a copy of the notice. He may hand this to the petitioner, or he may file the same in the court himself. If delivery of the copy of the notice bearing the sheriff's return, so-called, is made to the petitioner, the petitioner should forthwith cause it to be filed in the court so that it will be there prior to the time set for hearing.

In this respect you will not overlook section 6 of the statute, which provides for the issuance of a warrant for the child's appearance if it appear that service of a notice will be impossible or ineffectual. In such case, at the time of filing the petition, the petitioner should address himself to the court or the clerk, stating the facts for the belief that a warrant is necessary. The warrant will issue from the court and will be addressed substantially as follows: "To the Sheriff of the County of _____, or his Deputy, or to any Constable, or Police Officer, of any Town or City in said County". Consistently with this, the aid of a police officer should be enlisted and the warrant handed to him for service and action thereunder.

When in answer to a notice or pursuant to a warrant, the child is brought before the court, steps must be taken to provide for his care under the provisions of section 7. This section is entirely stop-gap or emergency in nature. The child having been taken from the person who theretofore had sheltered it, provision must be made for his immediate future to the end that he shall be fed, clothed and provided with shelter under competent care. It is by this section that the court provides for the immediate future of the child, whom, through the issuance of notice or by delivery of the warrant, it has brought into its control. The initial custody order made under section 7 need not be made in open hearing, it may be made by the Judge in chambers upon the application of the petitioner alone and without the necessity of any other parties being present.

By section 9 the court is enjoined to hold a hearing on the return of the summons, notice or other process or as soon thereafter as may be . . . It is at this time that the petitioner will be called upon to prove the facts set forth in his petition and which he relied upon as the basis for his allegation that the child is neglected. I should like to point out here that it is incumbent upon the petitioner to call the court's attention to the requisite of an early hearing; that is, the matter should not be allowed to coast along under a custody granted in section 7. And if the court does not of its own motion set the time for hearing in accordance with the statute, the petitioner himself should ask the court to do so.

The hearing contemplated by section 9 may consist of two

parts, depending on the circumstances. If the hearing is opened before an investigation of the child's circumstances has been made, it will undoubtedly be sufficient for the petitioner to show that his allegations concerning neglect are sufficiently likely to be true to justify the child's being held. After such showing, the procedure set forth in section 9 relative to investigation should be conducted forthwith, the child being held, meanwhile, by order of the court made under section 7. And when the report of investigation has been filed, the court should be requested to reopen the hearing for an order relating to final disposition of the matter.

If, on the other hand, a complete investigation of the case has been made and a report thereof has been prepared prior to the opening of the hearing, the entire matter may then be concluded, in the court's discretion.

From the point of view of the petitioner, the end sought in this proceeding is a finding by the court that the child is neglected and an order directing in whose custody the child shall be placed. In the ordinary case, if the petitioner be a representative of your Department, the order desired will place the child in your custody. Although the petitioner be your worker, request may well be made that a different custody than your own be ordered, depending on the welfare of the child and the interest shown by other parties bearing a relationship to the child who may appear.

In this connection I wish to point out that all parties who can reasonably have an interest in the child should be notified of the pendency of the proceedings. The petitioner need not, however, take upon himself that responsibility. At the time of the filing of the petition, he should advise the court to the best of his knowledge of those persons -- relatives of the child or others intimately associated with him and town and county officials -- and should request the court for instructions as to giving notice to any such persons.

We come now to the final consideration in the proceedings -- and the one of utmost importance. No action on behalf of the child can be beneficial unless immediate provision be made for his support. Therefore, the petitioner ought not leave the courtroom on final disposition of the case without a positive assurance of the source of the child's support.

The law of the matter of support is clear, being treated of in sections 7 and 11. The cost of support under the initial custody given under section 7 is arranged by order of the court, the burden being assigned either to county, town or state. In respect to the position of the state in this regard, your attention is invited to my letter of February 26, 1952.

Section 11 gives the rule for the support of children found to be neglected. Unless the court shall order otherwise, this child shall be supported by the town in which he resides. Upon payment of any funds for this purpose, the town may sue to be reimbursed by whoever is legally liable for the support of the child.

This provision is a most salutary one and one of which full advantage should be taken by your Department as petitioner. Under its terms the town of residence is made chargeable in the first instance. The law does not require a consideration of the legal concepts of settlement or of county liability. When the child comes to the petitioner's attention, he is residing somewhere. The word "reside" is used in its simplest sense, and refers to the place where the child is physically present when the petition is filed, assuming that he has the least semblance of an abode there and is not literally transient. That town, then, where the child is found must supply his support. Later, the officials of such town may examine the facts of the case and, through court proceedings or otherwise, require the person or municipality who or which, under the poor laws of the state, is actually liable for the child's support to pay the same. This is no concern of the petitioner.

To hold otherwise than as set forth above, to hold that the child should be without support until all the legal complexities relative to ultimate liability could be solved, at once would be contrary to the specific terms of section 11, and would accord a harsher treatment to children than that which is given indigent adults. Towns are required to relieve indigent adults found within their limits, without regard to settlement, R.L., c. 124, s. 1, with a right of recovery against the town or other unit ultimately liable, R.L., c. 124, s. 19. Indigent adults need not go without shelter pending an investigation and the outcome of a lawsuit; it would be absurd if the state required such procedure for that class of its citizens which it is most desirous of protecting.

The law, then, assigns the burden of support to the town wherein the child resides. The petitioner will have accomplished his mission if he allege and prove that the child was living in a given town when the petition was filed. In fact, he may then withdraw from active participation in the case.

However, it may be that the officials of interested municipalities take part in the hearing. The town wherein the child resides may wish to prove that the child is a liability of another town or of a county -- a fact which the officials of the last named municipalities may be unable to disprove. By section 9 the court may hear such proof and may make an order consistent with it, which order would avoid a circuity of actions and would assign initial responsibility to the municipality ultimately liable. Let me reiterate, the petitioner has no part in these matters. And may I point out again, if the court make no order relative to support, the town wherein the child resides is to be looked to for support. Written demand should be made upon that town to meet its obligations as soon as the finding of neglect is made and the order given. An information copy of the petition and order thereon may well be filed with the town officials, thereby furnishing these individuals with legal authority to expend the funds required. Above all, the petitioner should not undertake himself to attempt to resolve the matter of liability and to make demand on the town which he deems the responsible one. To do so would be to exceed his authority and to jeopardize the matter of immediate support.

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Finally, it is my suggestion that if any town fail to pay the child's support when due, the matter should be referred forthwith to this office for whatever legal course may be open to the state.

Very truly yours,

Warren E. Waters
Assistant Attorney General

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